

of \$20,050,015.92 or any part thereof or any interest claimed in the statement of claim.

It will be noted that in the letter quoted above the defendant did not admit liability. He was writing about repayment and that he and Dato' Abdullah would 'do the business to repay' the plaintiffs. Even if there is an admission of the debt in this case, in view of the serious questions of law and facts to be tried, the plaintiffs are not entitled to a summary judgment against the defendant. See *Low Boon Por v Selangor Engineering Works*,⁶ and *Perwira Habib Bank Malaysia Bhd v Haji Abdullah bin Haji Sulaiman & Anor*.⁷ *Low Boon Por's* case⁶ was concerned with judgment on admission of facts under O 32 r 6 of the former Rules of the Supreme Court 1967 and *Haji Abdullah's* case⁷ was concerned with O 27 r 3. Although these two cases were not cases on summary judgment under O 14, in my view, the principle laid down in the two cases are applicable to the present case.

For the reasons stated above, I allow the defendant's application and set aside the judgment entered against him on 8 February 1985. The defendant is given unconditional leave to defend the action. He will file his defence within three weeks from the date of this judgment. The defendant will pay the plaintiffs the costs of this application to be taxed by the senior assistant registrar and paid forthwith.

Order accordingly.

Solicitors: *Skrine & Co; Richard Talala & Co; Shook Lin & Bok.*

Reported by PS Ranjan

Yap Sing Hock Holdings Bhd & Ors v Chuah Teong Hooi & Ors

HIGH COURT (KUALA LUMPUR) – ORIGINATING MOTION
NO D2-32-36-1988
SITI NORMA YAAKOB J
17 FEBRUARY 1989

Companies and Corporations – Debenture given as security to bank for loan – Whether this was providing financial assistance for the purpose of purchasing, or dealing with a company's own shares – Companies Act 1965, s 67(1)

Evidence – Estoppel – Whether there was sufficient evidence to support this

The applicants had provided one of the respondents, the bank, with, inter alia, a debenture to secure two letters of guarantee from the bank to a syndicate of financial institutions which provided loans to the applicants for the purchase by the applicants of the entire share capital of three private companies. The debenture created a specific and floating charge of all its assets both present and future and provided for repayment of the

A loans by the applicants by 29 April 1986, failing which, the lenders would turn to the bank for payment under the two letters of guarantee.

B The applicants defaulted in payment and the bank was called upon to pay under the two letters of guarantee. The bank then demanded immediate repayment from the applicants and, following the applicants' failure to comply with such demand, the bank exercised its rights under the debenture by appointing managers and receivers to take possession of all the charged assets of the applicants. The applicants through this originating motion asked for a declaration, inter alia, that the debenture and the appointment of the managers and receivers were null and void as contravening s 67(1) of the Companies Act. The applicants maintained that reference to the debenture covering assets to be acquired by the applicants in future must mean the assets of the three companies and therefore, by means of providing their assets to be covered by the debenture, the three companies had given financial assistance to the applicants in the purchase of their own shares. The applicants also pleaded promissory estoppel in that the bank had, through negotiations, varied or nullified the debenture.

D Held, dismissing the application:

(1) There are two elements in the commission of an offence under s 54 of the English Companies Act 1948 with which s 67 is almost identical, viz: (i) the giving of financial assistance and (ii) it should have been given for the purpose of purchasing, dealing or lending money on its own shares. The words 'giving financial assistance' have no technical meaning and their frame of reference is the language of ordinary commerce. Each case must depend on the nature of the transaction involved.

(2) The only company that could be held responsible for contravening the statutory provision could only be the three companies and not the applicants and the applicants must show that the three companies provided financial assistance in the purchase of their own shares by the applicants.

(3) Such financial assistance could only take the form of the three companies creating a debenture over their own assets in favour of the bank but this was not the case as the debenture was created by the applicants. Thus, the creation of the debenture by the applicants did not offend s 67(1) of the Act.

(4) There was no oral evidence led in this case as the parties were content to rely on their own documents and the correspondence that passed between them. There was insufficient evidence based on the documents alone to conclude that the appointment of the receivers and managers was made in breach of some oral arrangement between the parties.

Cases referred to

- H 1 *Charterhouse Investment Trust Ltd v Tempest Diesel Ltd* The Financial Times, 28 June 1985 (folld)
2 *Heald & Anor v O'Connor* [1971] 2 All ER 1105 (distd)

Legislation referred to

Companies Act 1965 s 67(1)
Companies Act 1948 [UK] s 54

- I Subra Naicker for the applicants.
NB Naban for the bank and lenders.

Cur Adv Vult

Siti Norma Yaakob J: The only issue raised in this originating motion is whether a debenture executed by the first applicant with the third respondent on 29 April

1985 is caught by s 67(1) of the Companies Act 1965 ('the Act'). The debenture in question is one of the securities provided by the first applicant to secure two letters of guarantee from the third respondent to finance the purchase by the first applicant of the entire share capital of three private companies, namely, Lien Hoe Sawmill Co Sdn Bhd, Tee Bros Enterprises Sdn Bhd and Seng Aik Co Sdn Bhd ('the three companies') for a consideration of \$46m.

To finance the purchase, the third respondent arranged syndicated loans from a consortium of financial institutions ('the lenders') backed by its own guarantees. Initially, the third respondent required the first applicant to provide the following securities to secure the bank guarantees it was prepared to provide:

- (1) A pledge of all the shares of the first applicant to the third respondent.
- (2) A deposit of title deeds of certain pieces of land belonging to the three companies together with charges-in-escrow over them in favour of the third respondent.
- (3) An assignment of all the proceeds of sale of the assets of the three companies to the third respondent.
- (4) Personal guarantees of the directors of the first applicant.

As regards repayment, the third respondent had also requested that the sources for repayment should come from the cash fixed deposits and the proceeds of sale of the shares of the three companies. However, acting on legal advice that the securities asked for, particularly those to be provided by the three companies, are illegal transactions as contravening s 67(1) of the Act, the securities that were finally given by the first applicant were (1) a pledge of all its shares, (2) a debenture, creating a specific and floating charge of all its assets, both present and future and (3) the personal guarantees of its directors, the second to fourth applicants.

Under the debenture, the loans had to be repaid by the first applicant by 29 April 1986, failing which, the lenders would turn to the third respondent for payment under the two bank guarantees. The purchase price was duly settled by the first applicant on 29 April 1985 from loans extended by the lenders pursuant to two loan agreements executed by the first applicant with the lenders but on the date of repayment, the first applicant defaulted and the third respondent was called upon to pay under the two letters of guarantee. It did so and in order to recoup its losses, it demanded immediate repayment from the first applicant and following the latter's failure to comply with such demand, the third respondent exercised its rights under the debenture by appointing managers and receivers, the first and second respondents, on 9 May 1986 to take possession of all the charged assets of the first applicant and generally to do all acts which the

A first applicant may have done in the ordinary conduct of its business.

Two years and four months after such appointment, the first applicant together with its directors and shareholders, the second to fourth applicants have through this originating motion, asked for a declaration, inter alia, that the debenture executed by the first applicant with the third respondent and the subsequent appointment of the first and second respondent as managers and receivers under the debenture, are null and void as contravening s 67(1) of the Act, which states as follows:

B Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase deal in or lend money on its own shares.

D Under sub-s (3), if there is any contravention of sub-s (1), only the officer who is in default shall be guilty of an offence, the penalty for which is imprisonment for two years or a fine of \$10,000 or both. Our s 67 is almost identical to s 54 of the English Companies Act 1948 and in *Charterhouse Investment Trust Ltd v Tempest Diesel Ltd*¹ it was held that the two elements in the commission of an offence under the English s 54 is first the giving of financial assistance and secondly, it should have been given for the purpose of purchasing, dealing or lending money on its own shares. The case goes further to state that the words 'giving financial assistance' have no technical meaning and their frame of reference being the language of ordinary commerce. 'One must examine the commercial realities of the transaction and decide whether it can properly be described as the giving of financial assistance by the company, bearing in mind that the section is a penal one and should not be strained to cover transactions which are not fairly within it'. In other words each case must depend on the nature of the transaction involved.

H On the facts of this case, what the first applicant seeks to drive home is the fact that from its correspondence, the third respondent had specially requested that the debenture shall cover all the assets of the first applicant both present and future. This is further confirmed by s 3.01(i) of the debenture which states in no uncertain terms that the fixed and floating charge covers all the assets of the first applicant whatsoever and wherever situate both present and future. The applicants maintain that reference to the debenture covering assets to be acquired by the first applicant in futuro must mean the assets of the three companies, as at the time the debenture was executed, the assets of the three companies were the only certain and foreseeable assets to be acquired by the first applicant. That being the case, the applicants

maintain further that by means of providing their assets to be covered by the debenture, the three companies had given financial assistance to the first applicant in the purchase of their own shares. This renders the debenture illegal under s 67(1) of the Act and consequently the appointment of the managers and receivers is null and void and unenforceable.

To support their contention, the applicants rely on the case of *Heald & Anor v O'Connor*² where, on the facts it was established that a company had created a debenture over its own assets to secure a loan granted by the plaintiffs to the defendant for the purpose of enabling the defendant to purchase the company's shares. Under these circumstances, it was held that the debenture was illegal and void as it had contravened s 54 of the English Companies Act 1948 which is almost identical to our s 67.

The facts of the case before me are distinguishable from *Heald v O'Connor*,² in that the debenture was created by the first applicant who is purchasing the shares of the three companies. Reading s 67(1) and applying it to the facts of this case, it is my considered opinion that the only company that can be held responsible for contravening the statutory provision can only be the three companies and not the first applicant and to bring the three companies within the ambit of s 67(1), the applicants must show that the three companies provided financial assistance in the purchase of their own shares by the first applicant. On the facts of the case before me, that financial assistance can only take the form of the three companies creating a debenture over their own assets in favour of the third respondent as did the company in *Heald v O'Connor*.² But this is not the case here, as the debenture was created by the first applicant, the purchaser of the three companies and the debenture covers the assets of the first applicant then in existence and those to be acquired in the future.

Admittedly the first applicant's future assets must include the assets of the three companies but in this respect, such acquisitions were perfect the moment the first applicant had paid for them. That was done at almost the same time the syndicated loans were released to the first applicant and the debenture executed with the third respondent. From that point of time by virtue of such a purchase, the first applicant became a shareholder of the three companies and being the beneficial owner of all the assets of the three companies, it can deal with such assets in any way it thinks fit including charging them to the third respondent to secure the bank guarantees provided by the third respondent. Thus when reference is made that the debenture shall also cover all the future assets of the first applicant, it really means what it states, ie that the debenture covers only the assets of the first applicant present and future and not to the assets of any other company.

A On the facts of this case, it is my considered opinion that the creation of the debenture over the assets of the first applicant both present and future to secure the bank guarantees provided by the third respondent to enable the first applicant to purchase the paid-up capital of the three companies, does not offend s 67(1) of the Act.

B The applicants have also pleaded promissory estoppel in that the third respondent by a course of conduct, had represented to the first applicant that it will not enforce the debenture and the third respondent is now estopped from appointing receivers and managers to manage the first applicant's affairs. The course of conduct relied upon by the applicants are the negotiations between the parties to vary the debenture to enable the first applicant to put in more assets to secure the loan facilities. In this respect the applicants maintain that the proposals made at such negotiations had the effect of varying and nullifying the debenture as the applicants had acted on such proposals. The first applicant had, pursuant to such proposals, deposited all the title deeds of properties belonging to the three companies with the third respondent, transferred its shares into the names of the third respondent's nominees and that all other assets of the three companies have come under the control of the third respondent.

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The third respondent denies there was any express undertaking or agreement reached that it will not seek to enforce its rights under the debenture in the event there was default on the part of the first applicant to repay the syndicated loans. Moreover, under s 5.03 of the debenture, the third respondent is empowered to appoint managers and receivers 'at any time after the principal and other moneys hereby accrued shall have become repayable'. The third respondent had made a demand to the first applicant on 5 May 1986 for which the first applicant was unable to comply and under s 5.01 of the debenture, the security became enforceable under s 5.02(a). There is no oral evidence led in this case as the parties are content to rely on their own documents and the correspondence that had passed between them and since oral evidence could have resolved the existence or otherwise of any arrangement as regards the enforcement of the debenture and since in this case that it is not available, there is insufficient evidence based on the documents alone for me to arrive at the conclusion that the appointment of the receivers and managers was made in breach of some oral arrangement between the parties.

I For the reasons I have given, this originating motion must be dismissed with costs.

Motion dismissed.

Solicitors: *Subra Naicker & Co; Skrine & Co.*

Reported by *Yap Shao Sin*